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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN SANBORN, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DID THE SIXTH CIRCUIT ERR IN HOLDING THAT THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO PROVE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT OF PERJURY BEFORE A GRAND JURY, IN VIOLATION OF 18 U.S.C. 1653?

a. Did the Assistant United States Attorney fail to prove beyond a reasonable doubt that the testimony given by Defendant Sanborn before the grand jury was in fact false?

b. Did the Assistant United States Attorney misrepresent to the trial judge Defendant Sanborn's testimony before the grand jury, thereby rendering invalid the judge's finding of materiality?

c. Did the Assistant United States Attorney fail to prove beyond a reasonable doubt that the testimony given by Defendant Sanborn before the grand jury was material to the investigation being conducted by that grand jury?

d. Did the Assistant United States Attorney fail to prove beyond a reasonable doubt that Defendant Sanborn knew that the testimony he gave before the grand jury was false?

2. DID THE SIXTH CIRCUIT ERR IN HOLDING THAT THE JURY IN THIS CASE WAS NOT INCURABLY PREJUDICED AGAINST DEFENDANT SANBORN BECAUSE OF TESTIMONY REGARDING ALLEGED OTHER BAD ACTS IMPROPERLY ADMITTED INTO EVIDENCE DURING HIS TRIAL?

a. Did the Assistant United States Attorney prejudice the jury when she brought out that the Defendant was under a different indictment for another offense, for which he had not been convicted?

Petitioner John Sanborn contends that the answers to each of these questions is yes, and thus requires reversal of his conviction.

LIST OF ALL PARTIES IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

JOHN SANBORN,
DEFENDANT-APPELLANT

No. 90-2074.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN SANBORN, by and through his attorney, THOMAS A. HOWARD, petitions herein for a Writ of Certiorari to review the decision rendered in the United States Court of Appeals for the Sixth Circuit denying Petitioner's Appeal from his conviction in the United States District Court for the Eastern District of Michigan, Southern Division, on one count of Making a False Statement before a Grand Jury, in violation of 18 U.S.C. sec. 1623.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, filed March 18, 1991, affirming the District Court's conviction, is reprinted in full as Appendix A. The opinion of the Sixth Circuit has not been recommended for full text publication.

JURISDICTION

The Opinion and Decision appealed from was filed and entered on March 18, 1991, by the United States Court of Appeals for the Sixth Circuit. This Court's Jurisdiction is invoked pursuant to 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES

The Constitutional provision involved herein is the Sixth Amendment to the United States Constitution, which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Statutory provision herein involved is 18 U.S.C. sec. 1623 which states in pertinent part:

> False declarations before grand jury or court
>
> (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Federal Rule of Evidence 404(b) provides:

> Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes
>
> *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

Defendant John Sanborn was convicted as charged of one count of making a False Declaration Before the Grand Jury, 18 U.S.C. 1623, following a jury trial before Judge George E. Woods of the United States District Court for the Eastern District of Michigan held on June 11, 1990. On September 18, 1990, Judge Woods sentenced Sanborn to ten months imprisonment, followed by two years probation, as well as a Fifty ($50) Dollar Special Assessment Fee required by law.

The facts leading up to this conviction are fairly straightforward. In the last months of 1989 and the early part of 1990, a Federal grand jury out of the United States District Court for the Eastern District of Michigan was investigating Simon Basmajian and Patrick Rugerio regarding possible narcotics trafficking. Rugerio and Basmajian operated a limousine service under the name of Golden Touch Limousine Service, subsequently named the Stardust Limousine Service and Maxim. (grand jury testimony of Michael Knuth, January 30, 1990)

In connection with their narcotics investigation, the grand jury was also investigating the ownership of and activities taking place in a downtown Detroit nightclub known as Chassy's. Among the witnesses called before this grand jury was Defendant John Sanborn. Sanborn appeared before this grand jury twice; first on August 30, 1989 and subsequently on November 21 of that same year. *At no time was Defendant Sanborn ever suspected of delivering narcotics to or at Chassy's.* (Trial Transcript p. 124).

During his November 21, 1989 testimony, the grand jury asked Defendant Sanborn many questions regarding activities taking place at Chassy's. Sanborn was asked whether or not he knew Michael Basmajian, and truthfully answered that he had been introduced to Mr. Basmajian. (grand jury testimony, November 21, 1989, p. 17) Sanborn also willingly and openly discussed with the grand jury activities he saw taking place at Chassy's, (*Id* p. 19) and discussed his suspicions regarding narcotics trafficking at Chassy's. Sanborn testified openly as to his

relationship with the Basmajians, Patrick Rugerio, and all that he saw happening at Chassy's. *No allegation was ever made that Sanborn failed to disclose anything that he saw or knew about events at Chassy's.*

The discussion that gave rise to the indictment in this matter took place during Sanborn's November 21 testimony. John Sanborn had been a Garden City, Michigan police officer at the time he made the observations he discussed with the grand jury. The Garden City Police Department has specific regulations concerning employment outside of the department. John Sanborn had a number of outside jobs about which he testified before the grand jury. He admitted that he was a licensed construction builder, that he had shoveled snow, and that he had acted as a chauffeur for the limousine service. (grand jury testimony, November 21, 1989, pp. 13-15) When asked whether or not he had ever had been employee at Chassy's Sanborn replied in the negative. At his trial it was established that Sanborn was never on the Chassy's payroll as a regular employee. However, on two occasions when he was at Chassy's as a paying customer, he had voluntarily assisted in controlling unexpectedly large crowds. Sanborn testified that his assistance was voluntary and he did not expect to be paid for it. Moreover, he was not paid for his assistance on the nights that he rendered that help. Sanborn testified that it was perhaps a week later when he was offered an amount of cash in payment for his help. Sanborn indicated that he had not expected the money but it was offered as a gesture of gratitude for a favor rendered. There is no indication anywhere in the Grand Jury Transcripts or in the trial testimony that John Sanborn attempted to deceive the grand jury about his involvement with Chassy's or the parties under investigation, nor is there any indication that the question and answer at issue in this case did in fact or could have influenced or misled the grand jury on the issue before that grand jury.

Three months after this grand jury testimony, Defendant John Sanborn was indicated on one count of making a False

Declaration Before the Grand Jury, in Violation of 18 U.S.C. 1623.

A timely appeal was taken to the United States Court of Appeals for the Sixth Circuit on September 28, 1990. The Court of Appeals issued its ruling upholding Defendant's Conviction on March 18, 1991.

ARGUMENT

I.

THE EVIDENCE PRESENTED AT TRIAL WAS NOT SUFFICIENT TO PROVE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT OF PERJURY BEFORE A GRAND JURY, IN VIOLATION OF 18 U.S.C. 1623.

The elements of a violation of 18 U.S.C. 1623 are a false statement, made while under oath, before a grand jury or court of the United States, made by a person with knowledge that the statements are false, and that the falsity is material to the proceedings before that Tribunal. *Bronston* v *United States,* 409 U.S. 352, 93 S.Ct 595, 34 L.Ed.2d 568 (1973).

The statements made by Defendant Sanborn were not false statements. Moreover, even if it is argued that Defendant Sanborn's statements were false, in the context of the discussion which they were made, Defendant Sanborn did not realize that his statements were false. In addition, Defendant Sanborn's statements were not material to the investigation being carried out by the grand jury, nor were they material to any area of inquiry into which the grand jury might have reached.

A. The Assistant United States Attorney failed to prove beyond a reasonable doubt that the testimony given by Defendant Sanborn before the grand jury was in fact false.

The first element at issue is that the statement supporting a perjury conviction must in fact be false. A literally true statement, even if misleading in the context of the discussion, cannot support

a conviction for perjury. *Bronston,* supra, 409 U.S. at 359; *United States* v *Earp,* 812 F.2d 917, 919 (4th Cir. 1987). The *Bronston* court clearly stated that "Precise questioning is imperative as a predicate for the offense of perjury." *Id* at 362. "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id* at 360. *See also, United States* v *Cowley,* 720 F.2d 1037, 1042 (9th Cir. 1983) *cert. den.* 401 U.S. 1290. The law on this point is similar in the Sixth Circuit. *United States* v *Giacalone,* 587 F.2d 5 (6th Cir. 1978), *cert. den.* 442 U.S. 940; *United States* v *Richardson,* 596 F.2d 157 (6th Cir. 1979).

Application of the *Bronston* principle requires reversal of Defendant Sanborn's conviction in this matter. Before the grand jury, Defendant Sanborn was asked and truthfully answered:

> Q. Have you ever worked at a nightclub downtown called Chassy's, even for one day?
>
> A. I knew the owners down there, I was introduced to them and I spent some time down there, but never as an employee.

(grand jury testimony, November 21, 1989, p. 14) The Government's allegations that Sanborn was an employee of Chassy's was supported by virtually no evidence during the trial. Witness Robert Stevenson testified to seeing Sanborn in Chassy's and seeing Sanborn occasionally go behind a door marked "Employees Only." (Trial Transcript, p. 61.) However, Defendant Sanborn has never denied knowing the owners and the employees of Chassy's. As a friend of the owners, it would be natural for him to enter an "Employees Only" area if the owners were in fact there. Stevenson also testified that he never saw Sanborn pouring or serving drinks, taking money, or performing any other duties of a Chassy's employee. (Trial Transcript p. 62)

Kimberly Steiger also testified, claiming that Sanborn worked at Chassy's. However, she admitted that she never personally observed Sanborn working there, nor did she ever hear Sanborn in any work-related conversations with anyone at Chassy's. (Trial Transcript p. 72) Kevin Nowak, a fellow Garden

City Police Officer claimed that Sanborn told him that he (Sanborn) worked at a bar named Chassy's, but was extremely equivocal and uncertain about his testimony. (Trial Transcript pp. 80-81) Nowak was testifying regarding informal conversations held in mid to late 1988 — a year and a half to two years prior to his testimony at this trial. Even Steven Johnson, a co-owner of the Company that owned Chassy's, admitted that Sanborn was never on the Chassy's payroll, never filled out tax forms, never filled out standard personnel forms for Chassy's employees, and that when Johnson admitted that he "needed help", and Sanborn volunteered, that no discussion of the rate of pay occurred at that particular time. (Trial Transcript pp. 98-99). At best, the totality of this testimony shows nothing more than John Sanborn was seen at Chassy's (a fact Sanborn has never denied) and that, when the management of Chassy's "needed help", Sanborn volunteered to assist in whatever capacity he could. The government produced no evidence that Sanborn was an employee of Chassy's, or that he "worked" in anything other than an occasional voluntary capacity.

When Sanborn took the stand in his own behalf, he admitted "helping out" at Chassy's on two occasions when the bar was over-crowded or an employee failed to appear for work. Sanborn testified that he did not discuss payment, did not expect to be paid, and was surprised to receive any money subsequent to helping out. (Trial Transcript pp. 135-136) The Government did not produce any evidence refuting Sanborn's claims.

In *Bronston, supra*, the perjury defendant was being questioned at a bankruptcy hearing regarding accounts held in Swiss banks. In a hearing held in June of 1966, the following questions were asked and answers given:

"Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

A. No, sir.

Q. Have you ever?

A. The company had an account there for about six months, in Zurich.

Q. Have you any nominees who have bank accounts in Swiss banks?

A. No, sir.

Q. Have you ever?

A. No, sir."

409 U.S. at 354. The Supreme Court acknowledged that Petitioner's answers were literally truthful. Mr. Bronston did not, at the time of questioning, have a Swiss bank account. The company in question did have the account in Zurich described by the defendant. Neither at the time of questioning nor before did the Petitioner have nominees who had Swiss accounts. The Government's prosecution for perjury went forward on the theory that in order to mislead his questioner, Petitioner answered the second question with literal truthfulness but unresponsively addressed his answer to the company's assets and not to his own — thereby implying that he had no personal Swiss bank accounts at any time. *Id.* A unanimous Supreme Court reversed Bronston's conviction, stating that a literally true answer to a question, even if meant to deceive, cannot form the basis of a perjury conviction. 409 U.S. at 356-358 The Court also noted that "it is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." *Id*, 409 U.S. 358-359.

The *Bronston* principle applies precisely to the case at hand. Defendant Sanborn was asked "Have you ever worked at a nightclub downtown called Chassy's even for one day?". His answer was, "I knew the owners down there. *I was introduced to them, and I spent some time down there but never as an employee.*" (grand jury testimony, November 21, 1989, p. 14,

emphasis added) The United States Attorney did not probe that answer nor further question Sanborn regarding his relationship to Chassy's. Sanborn's answer was literally true. He did know the owners at Chassy's, he was introduced to them, and he spent some time there. However, his interrogator never pressed him to explain what he meant when he said "I spent some time down there. . ." The record clearly indicates that Sanborn was never an "employee". The most that can be said is that he assisted on two occasions with the crowd control and was later gratuitously given a sum of money for his volunteered assistance. An employee is "a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or the right to control and direct the employee in the material details of how the work is to be performed." *Black's Law Dictionary*, 5th Ed, p. 471 (West. 1979). Here, there was no contract of hire, and no right to control or direct the employee in the details of how the work was to be performed. Sanborn merely assisted as a volunteer on a very limited basis, and was subsequently given some money for his assistance.

There is a crucial difference between "helping out", "working" for a person, and being an "employee". This is not merely a matter of semantics or choice of words. By way of analogy, envision a physician boarding an airliner as a passenger. In flight, the doctor is informed that a passenger or flight attendant has become ill. Assume further that the doctor treats the stricken individual. The doctor does not work for the airline, merely because he assists that stricken attendant. Certainly, he does not become an "employee" of the airline. Even if the airline later send him an amount of money for having treated that person, it is not a falsehood for that doctor to deny ever "working for" or have been "employed by" the airline. The same principle applies to defendant Sanborn.

Because defendant's statement was literally true, and not a false statement before the grand jury, the essential element of falsity is unfulfilled, and requires reversal of Sanborn's conviction.

B. The Assistant United States Attorney Misrepresented to the Trial Judge Defendant Sanborn's testimony before the grand jury, thereby rendering invalid the judge's findings of materiality.

Out of the presence of the jury, during the materiality examination, the Assistant United States Attorney, perhaps inadvertently, misread the grand jury testimony, resulting in a crucial error. The Assistant United States Attorney read the following into the record, which she claimed was the colloquy with the grand jury:

> Q. Did you ever work at Chassy's?
>
> A. I have been there, *but never worked* as an employee.

(Trial Transcript, p. 112A) Were this the question and answer before the grand jury, defendant would not be able to argue that his testimony was the literal truth. However, as revealed by the transcript of the grand jury proceedings, the question and answer was in fact as follows:

> Q. Have you ever worked at a nightclub downtown called Chassy's even for one day?
>
> A. I knew the owners down there, I was introduced to them, and *I spent sometime down there but never as an employee.*

(grand jury transcript, November 21, 1989, p. 14) In determining materiality, the Trial Judge relied heavily on the testimony of Mr. Dager, that Sanborn denied being employed at Chassy's. The trial judge found:

> [I]t would strike the Court that this is a matter of common sense that for one to deny employment, when in fact there was employment, might or could or would chill further in depth questioning of given witnesses as to their employee status and to what the did have or did not have access on the premises. There is most assuredly an intimacy of an employee status or confidentiality possibility of being an

> employee which would infer that they did have access to further or other information other than a patron would necessarily have, nor would someone who merely knew the owners not necessarily have.
>
> But to be an employee of an establishment, even on a part-time basis, does connote to this Court the opportunity to have knowledge that a casual partygoer or patron would not necessarily have. *And to deny it, it would have the effect of interfering by at least in effect chilling a further or more in depth inquiry.* So the Court find then that this matter is material as a matter of law.

(Trial Transcript, p. 127-128, emphasis added.) The trial judge relied on what he believed was the fact that Sanborn had worked at Chassy's. *Sanborn did not answer whether he had worked at Chassy's, but denied being an employee.* Based on the evidence produced at trial, Sanborn's denial of being a Chassy's employee was true. Argument, Section I.(A), *supra.* Because the Assistant United States Attorney, perhaps inadvertently, stated that Sanborn denied ever "working" at Chassy's, the trial judge was misled regarding the nature of Sanborn's denial. Sanborn did not deny "working" at Chassy's; in fact he admitted "spen[ding] some time down there but never as an employee." He denied being an employee. The Assistant United States Attorney stated that Sanborn denied ever working there. This representation was incorrect. Since this mistake directly affected the trial judge's determination of materiality, that finding is tainted. Absent a valid finding of materiality, there is no actionable perjury. Defendant's conviction must be overturned on the basis of this clear error alone.

C. The Assistant United States Attorney failed to prove beyond a reasonable doubt that the testimony given by Defendant Sanborn before the grand jury was material to the investigation being conducted by that grand jury.

If Sanborn's statements to the grand jury were not false, then his conviction for perjury cannot stand. However, even if the

statement at issue was false, Sanborn's conviction must nevertheless still be overturned, because that misstatement was not material to the grand jury's investigation.

In order for a false statement to be actionable, the falsehood must be material to a matter under investigation by the grand jury. *United States* v *Cuesta,* 597 F.2d 903, 921 (5th Cir. 1979), *cert. den.* 444 U.S. 964; *United States* v *Martinez,* 855 F.2d 621 (9th Cir. 1988); *Richardson, supra,* 596 F.2d at 165. The test for materiality is whether the false testimony is capable of influencing the tribunal on the issue before it. *Cuesta, supra; Martinez, supra.* Under this standard, Sanborn's statement, even if false, was not material to the matter before the grand jury, and therefore cannot support a conviction for perjury.

During two days of testimony before the grand jury, John Sanborn testified about Patrick Rugerio, the Basmajians, Chassy's and his relationship to all of them. (grand jury transcript, August 30, 1989, p. 21; November 21, 1989, p. 14, 43, *et seq.*) Sanborn testified about his employment as a chauffeur, and about events he witnessed at Chassy's. He volunteered that he frequented Chassy's, and that he knew the owners. Such testimony clearly invited any further inquiry into events at Chassy's. Denial of the fact that he worked or Chassy's on two separate occasions would not have changed that.

At Sanborn's trial, the grand jury foreperson, William Dager, testified that Sanborn was called as a witness before the grand jury, because the grand jury received information that Sanborn had acted as a chauffeur for some drug dealers. (Trial Transcript p. 111-112) Dager testified that:

> Q. For purposes of the Grand Jury's investigation, why was it important, or why did you need to know if John Sanborn ever worked at Chassy's?
>
> A. Well, he would have possibly been a material witness to what had been going on, or what he might have seen going on at Chassy's. But, since he hadn't worked there,

> it precluded us from further investigation, either by the United States Attorney or the Grand Jury at that time.

(Trial Transcript, p. 112) However, the grand jury was not precluded from asking questions about what he had seen going on at Chassy's. Sanborn testified to seeing Michael Basmajian, and to joining him in Greektown, and in Chassy's. Had the Government attorney asked Sanborn a few simple questions about specific occurrences, or about his access to Chassy's operations, his position would have been clarified.

In *United States* v *Lasater*, 535 F.2d 1041 (8th Cir. 1976), the Court of Appeals recognized in a similar situation that a rationale for materiality similar to that here was insufficient to support finding materiality. There, the first of four separate counts of perjury concerned questions and answers regarding authorship of a letter. Defendant Lasater admitted signing the letter in question, but denied writing it, and claimed that another person, Cravens, wrote it. The Government claimed that these statements were false and that Lasater in fact had dictated the letter.

The United States Attorney involved testified that the author of the letter could shed some light "on the reasons why such an arrangement [as described in the letter] existed and precisely what the details of the arrangement were, who they were with, and whether this transaction was really intended to benefit [the subject of the grand jury investigation]". *Id.* at 1048.

The Court of Appeals held that such a rationale did not raise Lasater's false statements to the level of materiality justifying conviction for perjury:

> The government ignores, however, those part's of Lasater's grand jury testimony in which he discussed the . . . letter and its purpose in substantial detail. He admitted signing the letter. He stated its purpose. . . .
>
> Admittedly, the government attorneys did not ask the ultimate question: whether the transaction was intended to benefit Hearnes [the subject of the investigation]. But the

> failure to ask these questions could not have resulted from Lasater's denial of authorship of the guarantee letter. *His admissions showed that he had participated in this [transaction], and knew a great deal about its purpose. Whatever stopped the prosecution or grand jurors from asking the ultimate questions, it was clearly not a belief that Lasater had not authored the guarantee letter, nor that he was ignorant of its purpose.*

Id., emphasis added. This is identical to the case at bar. Sanborn testified at length about his relationship with the subjects of the grand jury investigation. He testified at length about what he saw at Chassy's. Whatever stopped the prosecution or grand jurors from asking the ultimate questions, it was clearly not a belief that Sanborn knew nothing about the goings-on at Chassy's.

"Precise questioning is imperative as a predicate for the offense of perjury." *Bronston*, *supra*, 409 U.S. at 362. The questioning here can hardly be described as precise. The Assistant United States Attorney knew what he was seeking from Sanborn: information regarding drug transactions taking place at Chassy's. Sanborn admitted he knew the people the grand jury was investigating, and he answered truthfully questions put to him about activities at Chassy's. The prosecutor did not ask detailed questions about Chassy's. She cannot now blame her failure on Sanborn's minor alleged misrepresentations regarding Chassy's.

Failure of the government prosecutors to ask the proper questions could not have resulted from the allegedly false statements charged in the indictment. Therefore, materiality is lacking, and Sanborn's conviction must be reversed.

D. The Assistant United States Attorney failed to prove beyond a reasonable doubt that Defendant Sanborn knew that the testimony he gave before the grand jury was false.

Defendant has previously argued that his statements to the grand jury were not false, but were in fact accurate statements. Argument, *supra*, sec. I.(A). If however, there was any inaccura-

cies in his statement, they were certainly inadvertent, and not intentional. Because such misstatements, if they exist, were not knowing false statements, they cannot support a conviction for perjury.

If a party does not understand a question and gives a non-responsive answer, such an answer is not perjurious. *United States* v *Fotie*, 137 F.2d 831, 842 (8th Cir. 1943); *United States* v *Paolicelli*, 505 F.2d 971 (4th Cir. 1974). Based on the testimony given by Sanborn before the grand jury, it is obvious that any misstatements he made were inadvertent, and not the product of knowledge of their falsity.

At his trial, Sanborn testified regarding his definition of "employee." He continued to deny being an employee of Chassy's, and testified:

> Q. In your own mind, what's an employee?
>
> A. An employee is somebody that's on payroll. It's a job like my police job was. It's something that's more permanent position and not just a part-time position, but something that you are scheduled to go to all the time.

(trial transcript, p. 134) While this definition does not exactly fit that in *Black's*, *supra*, it does describe Sanborn's idea of what an "employee" is. Under that definition, Sanborn was not an employee, and his statement to the grand jury that he was not an employee of Chassy's is not a knowingly false statement, necessary to uphold his conviction. Moreover, the vagueness of the question left room for multiple meanings, and Sanborn's answer could have meant one thing in one context, and another thing in another. Where the question propounded admits of several plausible meanings, the defendant's belief cannot be adequately tested and it is necessary to determine what the question meant to him when he gave the disputed answer. *U.S. v. Wall*, 371 F.2d. 398, 400 (6th Cir. 1967). This must be so because the essence of the crime of perjury as defined in the statute is the belief of the witness concerning the veracity of his testimony. *Id.* For this reason alone, Sanborn's conviction must be reversed.

II.

THE JURY IN THIS CASE WAS INCURABLY PREJUDICED AGAINST DEFENDANT SANBORN BECAUSE OF TESTIMONY REGARDING ALLEGED OTHER BAD ACTS IMPROPERLY ADMITTED INTO EVIDENCE DURING HIS TRIAL.

During the trial, the Government was permitted to bring out for the jury evidence of other claimed bad acts in which the Sanborn had allegedly been involved. This error resulted in a deprivation of the defendant's 6th Amendment right to a fair trial by jury. Such deprivation must result in reversal of Sanborn's conviction.

A. The Assistant United States Attorney prejudiced the jury when she brought out that the Defendant was under a different indictment for another offense, for which he had not been convicted.

Since part of Sanborn's defense at trial was that he did not intentionally lie to the grand jury, a number of character witnesses were offered in his defense. As may be expected, all testified to Sanborn's solid reputation for honesty in the community. One such witness was Garry B. Bennett. Mr. Bennett is a Wayne County Deputy Sheriff. During the Assistant United States Attorney's cross-examination of Deputy Bennett, she asked him this question:

> Q. Were you aware of the indictment or when he fraudulently used Lorraine Weekland's (ph) credit card and charged a thousand dollars of tires without their permission?

(Trial Transcript, p. 157) Defense counsel immediately objected to the question but was overruled by the trial judge. *Id.*

No such indictment exists, nor ever existed. Moreover, the Assistant United States Attorney, by telephone conference held during the preparation of the brief on appeal before the Sixth Circuit Court of Appeals, admitted that she knew of no such

indictment. At the time she asked the question, she was aware only of an internal police department investigation of these allegations. She apparently misstated herself. Stating to the jury that the defendant was under indictment was extremely prejudicial to the defendant, and an improper impeachment of his character.

Moreover, even if such an indictment were outstanding, evidence of such would be inadmissable under the Federal Rules Of Evidence. FRE 404(b) declares evidence of other crimes, wrongs or acts "not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Under FRE 608(b), evidence of specific acts is permissible *only* if such acts are probative of the truthfulness or untruthfulness of the witness or of another witness about which this witness testifies. Allegations of credit card theft are in no way probative of the truthfulness or untruthfulness of Defendant Sanborn. In this case, the Government attorney admitted the evidence solely for the purpose of prejudicing the jury into believing that Sanborn had committed credit card fraud of some sort. Such inadmissible and unsubstantiated claims so poison the minds of the jury that the defendant was deprived of his right to a trial by jury. *United States* v *Estell*, 539 F.2d 697 (10th Cir. 1976) *cert. den.* 429 U.S. 982. This error requires that Sanborn's conviction be reversed.

CONCLUSION

DEFENDANT SANBORN was convicted of making a False Statement to a Grand Jury based on insufficient evidence. No evidence was offered that showed that the statements made by Sanborn were false. Moreover, the trial judge abused his discretion in finding that the statements at issue were material to the investigations of that grand jury. Lastly, the Government failed to prove beyond a reasonable doubt that Sanborn knew his statements were false.

Moreover, Sanborn was prejudiced by the unsubstantiated allegations made by the Assistant U.S. Attorney that he had committed credit card fraud. Such prejudice deprived him of his right to a fair jury trial.

Because of these errors, individually and in combination, Defendant John Sanborn respectfully requests this court to vacate his conviction and sentence and discharge him, or in the alternative, remand the matter to the District Court for a new trial.

Respectfully Submitted,

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21125 Northwestern Highway
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Appendix A

No. 90-2074

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN SANBORN,
Defendant-Appellant.
_____/

ON APPEAL FROM
THE UNITED STATES
DISTRICT COURT
FOR THE
EASTERN DISTRICT
OF MICHIGAN

BEFORE: MARTIN and BOGGS, Circuit Judges; and ENGEL, Senior Circuit Judge.

PER CURIAM. John Sanborn appeals his jury conviction for making a false declaration before a grand jury in violation of 18 U.S.C. § 1623. For the following reasons, we affirm.

During late 1989 and early 1990, a federal grand jury sitting in the Eastern District of Michigan was investigating Art and Simon Basmajian, Patrick Rugerio, and Thomas Ahmed, regarding possible narcotics trafficking. During the course of the investigation, officials with the Garden City, Michigan, police department learned that one of their patrol officers, John Sanborn, had worked as a driver for a limousine service owned by the Basmajian family.

The grand jury investigation revealed that the Basmajians used their limousine service to transport narcotics from Detroit Metropolitan Airport to various locations in the surrounding area, including a downtown Detroit nightclub known as "Chassy's." The investigation revealed that Chassy's was frequented by the targets of the investigation and was the situs for a number of drug transactions. There was also testimony which established that John Sanborn sometimes worked as a doorman at Chassy's.

Appendix A

John Sanborn was called to testify before the grand jury on August 30, 1989 and November 21, 1989. During his appearance on November 21, 1989, the following exchange took place:

Q. Have you had any other part-time jobs, have you ever worked in a bar, even for a private party?

A. No.

Q. Have you ever worked at a nightclub downtown called Chassy's even for one day?

A. I knew the owners down there. I was introduced to them and I spent some time down there, but never as an employee.

Approximately three months after his November 21 appearance before the grand jury, John Sanborn was indicted on one count of making false declarations before a grand jury in violation of 18 U.S.C. § 1623. A jury trial was conducted which resulted in Sanborn being found guilty of the charge alleged in the indictment. Sanborn was sentenced to 10 months incarceration and two years of supervised release. This appeal ensued.

Sanborn argues on appeal that the evidence adduced at trial was insufficient to support his conviction under 18 U.S.C. § 1623. A criminal defendant challenging the sufficiency of the evidence bears a heavy burden. *See United States v. Vannerson*, 786 F.2d 221 (6th Cir.), *cert. denied*, 476 U.S. 1123 (1986). The standard of review applied by this Court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, *reh'g denied*, 444 U.S. 890 (1979); *United States v. Bourjaily*, 781 F.2d 539 (6th Cir. 1986), *aff'd*, 483 U.S. 171 (1987). All evidence must be viewed in the light most favorable to the government. *See, e.g., Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Chandler*, 752 F.2d 1148, 1151

(6th Cir. 1985). Furthermore, this Court may not make credibility determinations or weigh the evidence; those functions are within the province of the jury. *Glasser*, 315 U.S. at 80; *United States v. Stull*, 743 F.2d 439, 442 (6th Cir. 1984), *cert. denied*, 470 U.S. 1062 (1985).

To convict Sanborn, the jury was required to find that, in testifying under oath before a grand jury, he knowingly made a false declaration as to a material fact when he denied that he ever was employed at Chassy's or had ever worked in a bar. 18 U.S.C. § 1623(a); *United States v. Watson*, 623 F.2d 1198 (7th Cir. 1980); *United States v. Whimpy*, 531 F.2d 768 (5th Cir. 1976).

Sanborn first argues that his testimony before the grand jury was the literal truth. In *Bronston v. United States*, 409 U.S. 352 (1973), the Supreme Court held a witness may not be convicted of "perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication." *Id.* at 353. *See also United States v. Eddy*, 737 F.2d 564 (6th Cir. 1984). Sanborn argues that the principle of *Bronston* is applicable in this case and therefore, his conviction requires reversal. We disagree. Sanborn was asked, "Have you ever worked at a nightclub downtown called Chassy's even for one day?". He answered, "I knew the owners down there. I was introduced to them and I spent some time down there, but never as an employee." This answer can only be reasonably interpreted as a denial by Sanborn that he ever worked at Chassy's. If Sanborn would have simply acknowledged that he knew the owners of Chassy's and not denied that he was ever an employee his argument under *Bronston* would be plausible. In that instance his answer would have been the literal truth, albeit unresponsive. But Sanborn's answer was directly responsive to the question asked and was later found by a jury to be false. This conclusion is further supported by the exchange which directly preceded this one where Sanborn denied ever working in any bar.

Sanborn next argues that his false declarations were not material to a matter under investigation by the grand jury. The determination of materiality is a question of law for the court to decide. *United States v. Richardson*, 596 F.2d 157, 165 (6th Cir. 1979) (quoting *United States v. Giacalone*, 587 F.2d 5, 6 (6th Cir. 1978), *cert. denied*, 442 U.S. 940 (1979)). Because the question of materiality is a legal question, not a question of fact, the government need not prove materiality beyond a reasonable doubt. *United States v. Berardi*, 629 F.2d 723 (2d Cir.), *cert. denied*, 449 U.S. 995 (1980); *Giacalone*, 487 F.2d at 7.

In its classic formulation, materiality is established where the false declaration has, "a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation...." *Carroll v. United States*, 16 F.2d 951, 953 (2d Cir.), *cert. denied*, 273 U.S. 763 (1927). Merely potential interference with a line of inquiry is sufficient to establish materiality. *Richardson*, 596 F.2d at 165; *see also United States v. Swift*, 809 F.2d 320, 324 (6th Cir. 1987). We find that the district court properly concluded that these statements were material as a matter of law. As an employee of Chassy's, Sanborn might have had access to information that was unavailable to a mere patron. The fact that Sanborn denied his employment at this particular establishment almost certainly chilled inquiry into the existence of that information.

Finally, Sanborn argues that the district court erred in permitting testimony concerning prior "bad acts" in violation of FED. R. EVID. 404(b). As part of his defense, Sanborn called Gary Bennett to testify as to Sanborn's reputation for truth and veracity. Bennett testified that Sanborn's reputation was outstanding and that he had "never heard anything bad about him." During cross-examination, the government inquired:

> Q. Were you aware of the indictment or when he fraudulently used Lorraine Weekland's (ph) credit card and

charged a thousand dollars worth of tires without their permission?

The trial court overruled defense counsel's objection to this question.

Sanborn claims that the reference to the credit card fraud violated FED. R. EVID. 404(b) and incurably prejudiced the jury[1]. We disagree. The law is clear that evidence of past criminal activity is inadmissible to show criminal propensity. *See United States v. Davis*, 707 F.2d 880, 884 (6th Cir. 1983). However, FED. R. EVID. 404(b) is inapplicable in this instance because this evidence was not elicited to prove that Sanborn acted in conformity with his character. Bennett testified as to Sanborn's reputation in the community for truth and veracity. FED. R. EVID. 405(a) allows, on cross examination, inquiry into relevant specific instances of conduct. *See Michelson v. United States*, 335 U.S. 469 (1948). "If, as here, their direct testimony is addressed to community reputation, inquiry may be made about conduct, and even about charges, which may have come to the attention of the relevant community." *United States v. Frost*, 914 F.2d 756, 772 (6th Cir. 1990) (quoting *United States v. Curtis*, 644 F.2d 263, 268 (3d Cir. 1981), *cert. denied*, 459 U.S. 1018 (1982)). Therefore, the government was permitted to question Bennett as to his knowledge of Sanborn's indictment or involvement in credit card fraud.

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[1]Sanborn also argues that the government, through this question, implied that he was under indictment for credit card fraud. However, a fair reading of the question posed by the government reveals that the reference to the indictment referred to the indictment which prompted Sanborn's trial.

Appendix A

Therefore, for the reasons given above, we AFFIRM the judgment of the district court.

ISSUED AS MANDATE: March 18, 1991

COSTS: NONE

A TRUE COPY
Attest:
LEONARD GREEN, Clerk

By /s/ SHARON R. TALLARIGO
Deputy Clerk